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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 851

HARVEY HUTTON HUTCHINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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HARVEY HUTTON HUTCHINS,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Harvey Hutton Hutchins, Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on September 17, 1969.

OPINION BELOW.

The opinion of the court of appeals is not yet reported and is printed as Appendix A, *infra*.

JURISDICTION.

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on September 17, 1969. On October 13 1969, Mr. Justice Black extended the time for filing of a

Petition for a Writ of Certiorari for an additional thirty days, to November 16, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED,

1. Whether there was a prejudicial misjoinder of offenses and defendants in the four-count indictment where (1) the conspiracy count (Count I) alleged three separate and distinct conspiracies and series of transactions, (2) each of the three substantive counts (Counts II, III and IV) related to only one of such conspiracies, (3) petitioner was charged only in Counts I and III, (4) only one other defendant of seven defendants on trial was charged with petitioner in the substantive Count III and such defendant was acquitted on that Count III, and (5) the evidence in no way associated petitioner with the other two conspiracies or Counts II and IV.

2. Whether petitioner was so prejudiced by such joinder of offenses and defendants in a trial together that the trial court, knowing prior to trial that the evidence would show three separate conspiracies, abused its discretion under Rule 14, F. R. Crim. P., in denying petitioner a severance or other relief required by justice.

As to the following questions presented, petitioner adopts the Reasons for Granting the Writ which are set forth in the Petition for a Writ of Certiorari of his co-defendants, Donald Lester James et al., No. 746, October term, 1969, filed October 16, 1969.

3. Whether an indictment and convictions are valid where the jury array from which the petit and grand jury were selected in 1967 was intentionally composed of 52% women and 33⅓% Negroes.

4. Whether listing the generic class of items to be seized in search warrants satisfies the Fourth Amendment

and whether the affidavits filed herein were sufficient to establish probable cause for such search warrants. Was evidence illegally seized from co-defendant Kress and should his motion to suppress have been granted?

5. Whether in a joint trial of seven defendants where each had made incriminating post conspiracy statements and admissions and where some admissions implicated other defendants and where the District Court admitted into evidence twenty statements limited solely against a single defendant, severance was required to secure a fair trial. Was severance in order under **Bruton v. United States**, 391 U. S. 123 (1968)?

6. Whether a showing of particularized need is necessary under **Dennis v. United States**, 384 U. S. 855 (1966), before grand jury testimony of two key prosecution witnesses will be made available for use on cross-examination.

7. Whether the District Court erred in refusing to dismiss the indictment and/or grant a new trial by reason of instructions by the Government to a key prosecution witness to falsify when interviewed by defense counsel. Did this suppression of evidence deny petitioners due process?

8. Whether there was improper and prejudicial publicity released by the Government herein and improper influence exercised upon the grand jury. Whether the overall conduct of the government denied petitioners a fair trial.

9. Whether the District Court's charge to the jury construed as a whole was confusing and erroneous. Whether the charge instructed the jury properly on reasonable doubt, on aiding and abetting, on conspiracy, on gambling under Mississippi law, and on **criminal intent.**

STATUTES AND RULES INVOLVED.

18 U. S. C. 1952 provides, in part:

"(c) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mails, with intent to—

* * * * * * *

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of an unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3) shall be fined not more than $10,000 or imprisoned for not more than five years or both.

* * * * * * *

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling * * * offenses in violation of the laws of the state in which they are committed in the United States * * *".

Rule 14 of the Rules of Criminal Procedure provides:

"RELIEF FROM PREJUDICIAL JOINDER.

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

Rule 8 of the Rules of Criminal Procedure provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT.

Both the indictment (R. 1-10) revealed, and the evidence disclosed, that this case involved three separate and distinct plans, transactions or series of transactions. Petitioner was associated with only one of them, Check Cashing Service, Inc. Although seven defendants were jointly tried, only one of them, Dewey D'Angelo, was alleged to have participated along with petitioner in the Check Cashing Service, Inc., and he was acquitted of the substantive charge (Count III) relating to Check Cashing Service, Inc. (R. XXIV). Despite the fact that this situation was clearly revealed to the trial court by the indictment (R. 1-10) and the statements of defendants (R. 101-137, 438-507) which the court was asked to examine pursuant to motion for severance and Rule 14, F. R. Crim. Proc. (R. 23), the court repeated overruled motions for severance, election and dismissal, alleging misjoinder and prejudice

from a joint trial, both before trial and during the trial (R. XIV-XV, 460, 14-15, 21-23, 26-30, III-XV, XVII, 107, 448, 460, 732).

The evidence established that one Harry Bennett, a deceased defendant and professional gambler, owned and operated a gambling casino in Biloxi, Mississippi, known as the Red Carpet Club, which he opened in November or December, 1964 (R. 1057-8).[1] It was not a financially successful business (R. 1059) and in early 1965 his front room boss, defendant Dewey D'Angelo, suggested that he purchase and install an electronic device referred to in the evidence as a "juice joint" which would control the dice employed at the dice tables (which were impregnated with metal) so that the Club could cheat the customers (R. 1059, 1061). This device was obtained by Harry Bennett from defendant Kress in Tulsa, Oklahoma (R. 1064-5). On or about March 17, 1965, defendants James and Orrels transported the device from Tulsa to the Red Carpet Club (R. 134, 1005-16, 1068), where it was installed by defendants James, Rolling, Kress and co-conspirator Arnold by March 19, 1965 (R. 1005-6, 1417-8, 1388, 1807-10, 1417-8).

There it was employed to cheat customers (R. 502) until June 16, 1965, when the Red Carpet Club was closed by court injunction (R. 1090).

In August, 1965, Harry Bennett, along with defendant D'Angelo, opened another gambling club in Biloxi, known as Deano's Lounge, to which was moved the "juice joint" (R. 440-72, 1098-9). This was done by D'Angelo, Rolling, Arnold and government witness Brown (R. 1808, 1100-5). Defendant D'Angelo operated this club, and in October,

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[1] In May 1965, Harry Bennett was convicted in U. S. District Court in Des Moines, Iowa of violations of 18 U. S. C. 1084 (a), 1952 and 371, in that he transmitted a gambling line by telephone from Biloxi and New Orleans to Des Moines during the years 1961 and 1962 (R. 290-291, 298). This conviction was reversed on November 14, 1966, because of illegal search. **Gillespie, et al. v. U. S.**, 8 Cir., 361 F. 2d 1.

1965, the ownership of the club was transferred entirely to D'Angelo (R. 1108). On November 23, 1965, the "juice joint" was seized by local authorities and the F. B. I. (R. 474-6, 1838-9, 1851).

On July 21, 1966, the business of defendant Kress in Tulsa was raided, and extensive dishonest gambling equipment was seized (R. 525-726).

The vast majority of the volume of the evidence at the trial concerned the "juice joint", the dishonest equipment and materials seized from Kress, and cheating of customers who gambled at the clubs by use of the "juice joint".

The evidence was conclusive and consistent that petitioner had no connection with or knowledge of this activity. Robert Bennett, a young lawyer son of Harry Bennett, was a principal Government Witness and informant (R. 1158-64). He not only was personally aware of the installation of the "juice joint" (R. 1075-9), but also had talked to his father, whom he represented in this charge (R. 1198), about the entire factual story concerning the "juice joint" (R. 1065, 1067, 1073, 1075). He testified that petitioner did not "know anything at all about the juice joint", and that he did not "have any connection, direct or indirect, with the juice joint" (R. 1134). He was corroborated by other Government witnesses, including Maurice Arnold (R. 1487), and Jean Proctor (R. 1303, 1336-9). All three were alleged to be co-conspirators. Petitioner also testified that he did not know of the "juice joint" (Tr. 1652).

The Government adduced at the trial extensive pre-indictment statements of defendants D'Angelo, James, Orrels, Rolling and Kress to F. B. I. Agents (R. 101-137, 438-507).[2] Not one of them associated petitioner with the "juice joint" or with knowledge of its existence.

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[2] These statements are summarized at pp. 4-6 of the Petition for a Writ of Certiorari of petitioner's co-defendants now pending with this Court, No. 746, this term.

Finally, the trial court, after the close of the Government's evidence during argument for judgment of acquittal, stated to petitioner (R. 728): "I heard this testimony and they are not after you about having any connection with a juice joint, and we all know that".

In 1964 and 1965, Harry Bennett and the Red Carpet Club were represented in Biloxi by attorney Richard Yarbough, who also defended Harry Bennett in Des Moines (R. 290). Harry Bennett's son, witness Robert Bennett, was a law clerk in Yarbough's office (R. 1075, 1076, 1078, 1139).[3] The Red Carpet Club was having trouble collecting checks cashed there. As a first effort to solve this problem, the Red Carpet Club, on advice of Yarbough and Robert Bennett, stopped accepting checks for gambling debts but accepted them only in exchange for cash, with the prospective customer signing a statement that they were for cash money and that there was no obligation on the customer to use the money for gambling or any other purpose. This program and the forms for these statements to be signed by customers were devised and drafted by Yarbough and Robert Bennett (R. 1092-3, 1142-3). This did not fully solve the problem.

In March, 1965, petitioner was a young attorney practicing law in Biloxi and had assisted Yarbough in some respects with the Des Moines indictment (R. 291, 294, Tr. 1670). Robert Bennett was a law clerk in Yarbough's office. On March 17, 1965, petitioner drove to New Orleans on some business. Robert Bennett rode with him as Robert Bennett's brother lived in New Orleans. On this trip Robert Bennett rented a concrete saw, at the request of his father, which was later used in the installation of the "juice joint". But at that time even Robert Bennett did not know its purpose (R. 1070-4, 1181), and,

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[3] Robert Bennett was admitted to the Bar in the fall of 1965 (R. 1053).

as we noted, petitioner never did know anything about the "juice joint" (R. 1070-4, 1181).

At the same period of time, Robert Bennett was seeking a solution to the check collecting problem of the Red Carpet Club. He and Yarbough had researched the law and found no pertinent court decisions, particularly as to the effect or force of 18 U. S. C. 1952 with respect to the checks handled as he and Yarbough had devised (R. 301-3, 1091, 1139).

On the trip to New Orleans, and at other times around this period of time, the matter was discussed by Robert Bennett with Petitioner and with Yarbough (R. 292, 299, 300, 1091-3, 1138). Robert Bennett and petitioner believed that out-of-state checks exchanged for cash, and later sent interstate for collection, were not a violation of Section 1952 (R. 300, Tr. 1684-6). Yarbough testified that he expressed the opinion that such procedure would violate Section 1952 (R. 292-294, 299-300), although he was disputed on this by both Robert Bennett and petitioner (R. 1142, 1210). In any event, Yarbough testified that petitioner was sincere in his belief that it was not a violation of law (R. 300).

On March 29, 1965, petitioner and Robert Bennett opened an account in the Gulf National Bank, Gulfport, Mississippi for Check Cashing Service, Inc. into which were deposited checks exchanged for cash as indicated above at the Red Carpet Club, until it closed in June. This practice was continued for checks handled in the same manner at Deano's Lounge until D'Angelo took complete ownership in early October (R. 1156, 1190, 1156).

The checks were brought to petitioner's office by Robert Bennett, and the deposits were made by petitioner's secretary, Mrs. Jean Proctor (R. 1094, 1141-4, 1294-1356). Both Robert Bennett and petitioner received a 2½% commission on all checks which were collected (R. 1095). The account was closed in October, with petitioner earning and

receiving about $2,000.00 out of the service (R. 1140). Petitioner had nothing to do with the cashing of checks (R. 1135). Only Harry Bennett and D'Angelo cashed checks (R. 1137), and the procedure was only for cash (R. 1140).

It was first intended by petitioner and Robert Bennett that the service be incorporated, that it have premises and a location apart from the casino where the checks would be cashed, and that it cash checks from customers and persons coming from additional gambling establishments. None of these plans, even the incorporation, were ever perfected (R. 1093-4).

After D'Angelo became sole owner of Deano's Club, he and defendant Dianne Whitmire opened a similar account on October 4, 1965, for a similar purpose, known as the account of A. D. Marks. Petitioner had no connection with or knowledge of this check cashing service (Tr. 1658, 1776).

As we have noted, prior to trial petitioner and the other defendants filed extensive motions attaching the indictment for duplicity because it involved three separate alleged conspiracies or series of transactions, and asking for severance for that reason, alleging prejudice by a joint trial. For this purpose, the court was requested, pursuant to Rule 14, to examine the statements of defendants (R. 23). That these statements revealed that the evidence would be as it turned out later is clear from the evidence at the trial for the statements of defendants were admitted into evidence (R. 101-137, 438-507). Indeed, this was clear from the indictment itself (R. 1-10). These motions were repeatedly renewed and overruled throughout the trial (R. 107, 448, 460, 732).

The Court instructed that "specific intent must be proved before there can be a conviction", that is, that a defendant knowingly disobeyed or disregarded the law (R. 973-4).

Petitioner was sentenced to imprisonment for three years, with the last two and one-half years suspended and placed on probation for five years (R. XXVIII).

REASONS FOR GRANTING THE WRIT.

1. Important questions of general applicability affecting the administration of criminal justice in the Federal Courts, and the application of Rules 8 and 14 of the Federal Rules of Criminal Procedure, are here presented. Separate and distinct conspiracies, even though they have a common link and like object, cannot be joined together and prosecuted as a single conspiracy. **Kotteakos v. United States**, 328 U. S. 750; **Canella v. United States**, 157 F. 2d 470 (C. A. 9); **United States v. Goss**, 329 F. 2d 180 (C. A. 4); **Rocha v. United States**, 288 F. 2d 545 (C. A. 9); **United States v. Russano**, 257 F. 2d 712 (C. A. 2); **Dailey v. United States**, 282 F. 2d 818 (C. A. 9). However, a single conspiracy may exist even though not all the conspirators participated in all parts of the conspiracy, particularly when it extends over a long period of time. **Blumenthal v. United States**, 332 U. S. 539. This type of conspiracy has been referred to as a chain conspiracy. **United States v. Barelli**, 336 F. 2d 376, 383 (C. A. 2), certiorari denied 379 U. S. 960.

The Court below found the evidence in the instant case to establish a single chain conspiracy, because "those present at the beginning as well as those remaining at the end, and those who participated in between, intended to establish a gambling enterprise and to promote that enterprise in a variety of ways through the use of facilities in interstate commerce". But the fact that some objects of distinct activities are similar, or even identical, is not enough to make such activities all a part of one single conspiracy. Each such activity must be a part of one "single, over-all, comprehensive plan", design or agreement. **Blumenthal v. United States**, *supra*, at 558.

And "the gist of the offense remains the agreement". **United States v. Barelli**, *supra*, at 384. The three activities shown by the evidence here were not links of one chain or conspiratorial plan, but separate and distinct plans.

The objects expressed by the Court below were, at the most, as to each of the three activities, a by-product of some bigger and more compelling plan or design. The conscious object of those engaged in the "juice joint" enterprise was to cheat customers. The object of those, such as petitioner, who engaged in each of the two separate check collecting ventures was quite the opposite. The evidence does not permit an assumption or inference that petitioner had knowledge of the "juice joint" venture, much less its dishonest nature. The Government's own evidence affirmatively established that there was no overriding conscious design or plan which tied the three ventures together into one conspiracy.

For a long time, since **Blumenthal** was decided in 1947, the Federal Courts have been struggling to solve the problems of mass conspiratorial trials, and consequently joinder, by undertaking to fit each conspiracy case into "wheel" or "chain" activities as illustrated by **Kotteakos** and **Blumenthal**, respectively. It has been said that such distinction "is not a substitute for close thinking in particular cases". Wright, I **Federal Practice and Procedure**, 332. Because the prejudice to petitioner of the joint trial is so clear in the instant case (cf. **Berger v. United States**, 295 U. S. 78), and the activities so distinct and dissimilar, this case is, we submit, an excellent vehicle for this Court to clarify the law on this important subject in the administration of criminal justice.

2. It has been said that "trials involving large numbers of separate offenses are not the favorites of the law". **Daly v. United States**, 342 F. 2d 932, 933 (C. A. D. C.),

certiorari denied 382 U. S. 853. Though many of the States have practiced this principle, requiring a separate trial for each offense and each defendant (See R. S. Mo. 1959, Section 545.880), we candidly confess that this principle has not been practiced much in the Federal Courts. It is this distinction in Federal and State law alone which causes the members of the Bar in the area in which we practice law to believe that an accused receives a fairer trial in the State Courts than he does in Federal Courts. But this Court, while more recently engaged in correcting other State and Federal abuses in criminal justice, has not been wholly indifferent to this injustice in Federal Criminal Procedure. During the redrafting of the Federal Rules of Criminal Procedure, this Court asked the Advisory Committee whether any study of the abuse of indictments drawn with an excessive number of counts had been made. Orfield, **Relief From Prejudicial Joinder in Federal Criminal Cases**, 36 Notre Dame Law 276, 766.

One significant change was made in Rule 14. It permits the trial Court to inspect statements of defendants to aid in ruling on a pre-trial motion for severance. These statements, which were a large part of the Government's evidence at the trial, revealed, prior to trial, the factual proof which later ensued. Further, there was only one other person (D'Angelo) being tried who was associated with petitioner's activities. Harry Bennett was dead, and Robert Bennett and Mrs. Proctor were not charged as defendants. It seems to us this is certainly a case where the trial Court abused its discretion in denying a severance. Cf. **United States v. Talenfeld**, 190 F. Supp. 108, 110; **Haggard v. United States**, 369 F. 2d 968, 973-4 (C. A. 8). Certainly it is an appropriate case for this Court to delineate the duties of a trial Court pursuant to Rule 14. For this Court has said that the trial Court should become "particularly sensitive" to prejudicial joinder. **Shaeffer v. United States**, 362 U. S. 511, 516.

CONCLUSION.

For the reasons stated herein, and in the Petition for a Writ of Certiorari of co-defendants **James et al.**, No. 746, this Term, we respectfully submit that the Petition should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

In the
United States Court of Appeals
For the Fifth Circuit

No. 26162

Donald Lester James, Ivan Orrels,
Dewey D'Angelo, Alice Dianne Whitmire,
Raymond Leroy Rolling, Jack Edward Kress,
and Harvey Hutton Hutchins,
Appellants,

versus

United States of America,
Appellee.

Appeals from the United States District Court for the Southern District of Mississippi

(September 17, 1969)

Before Brown, Chief Judge, Dyer, Circuit Judge, and Hunter, District Judge.

Hunter, District Judge: Appellants were tried by a jury under a four-count indictment charging them with conspiracy to violate and substantive violations of 18 U.S.C.A. 2, 371 and 1952.

Count One charged that defendants conspired in violation of 18 U.S.C.A. 371 to use certain facilities in interstate commerce with intent to carry on an unlawful gam-

bling enterprise in violation of Sections 1952 and 2 of 18 U.S.C.A. The alleged conspiracy included the use of trailer facilities of U-Haul Trailer Company between Oklahoma and Mississippi for the purpose of transporting in interstate commerce a "Juice joint" to control dice games conducted in violation of Mississippi law. The alleged conspiracy also included the interstate use of the mails to cash gambling checks. All appellants except Orrels were found guilty on this count.

Count Two charged five appellants (Whitmire and Hutchins not included) with causing the use of U-Haul Trailer facilities in interstate commerce to transport electromagnets from Oklahoma to Mississippi, to be used at the Red Carpet Club and Deano's Lounge in Biloxi to control dice games conducted in violation of the gambling laws of Mississippi. Appellant Rolling was found not guilty of this charge. Four appellants—Jack Kress, Dewey D'Angelo, Donald James and Ivan Orrels—were found guilty. Count Three charged Bennett, D'Angelo and Harry Hutchins used the United States mails by causing the Gulf National Bank in Gulfport, Mississippi to place in the mails for collection checks drawn by John Turner on an Iowa bank with the intent to carry on an unlawful gambling enterprise in violation of Sections 1952 and 2 of 18 U.S.C.A. Only Hutchins was found guilty. Count Four charged D'Angelo and Whitmire with using the mails by causing the same bank to place in the mails checks drawn by Harold Holt on a Tennessee bank with the intent to carry on an unlawful gambling enterprise in violation of the same statutes.

Appellants assert numerous errors. The conclusion of their brief reveals the vigor of their attack upon the convictions:

"Conclusion."

"This was no ordinary prosecution but rather one where the Government sought to indict and convict

by means fair or foul. The proceedings before the grand jury were accompanied by misconduct on the part of the prosecution and followed by an improper press release, the indictment was prejudicially conceived and framed, the defense preparation for trial was marred by governmental interference, the evidence introduced at the trial was the product of illegal search and seizure, appellants were tried by unfair utilization of hearsay and admissions received in evidence without affording appellants the rights protected by the Sixth Amendment, the Government's closing arguments were permeated by unfairness and then to climax this pyramid of prejudice and unfairness, a confusing and erroneous charge was delivered to the jury. Convictions procured in this fashion should not be permitted to stand. We urge reversal."

From our review of the record before us we cannot see any indication that appellants have been the victim of miscarried justice. The facts proved against them made the verdict inevitable. We affirm.

Able counsel have thoroughly argued and briefed their contentions. These will be treated separately, but first we shall detail some of the evidence giving rise to this prosecution so that appellant's allegations of error may be placed in proper perspective. The evidence is to be viewed in the light most favorable to the jury verdict. *Glasser v. United States,* 315 U. S. 60, 62 S. Ct. 457.

SUMMARY OF EVIDENCE

The Government's witnesses consisted of eleven F. B. I. agents, four state officials and thirty-one additional witnesses, together with some forty-three exhibits. The evidence reveals that a gambling casino, the Red Carpet Club, was opened in Harrison County, Mississippi, in November of 1964. It was located in the former home of Harry Ben-

nett, who was indicted as a co-conspirator but died before trial. Defendant D'Angelo was the record owner of the Club. Defendant Rolling owned an interest as a result of a $7,500 loan made to Bennett. Defendant James owned a ten percent interest. D'Angelo managed the "front room" of the casino. Rolling was in charge of the dice table. Business at the Red Carpet Club was poor, and in December, 1964, Bennett and James discussed the possibility of placing a device to the gambling table to control the roll of the dice. Defendant Kress came to the club and met with Bennett at that time, and when he returned in January of 1965, Maurice Arnold, the club's maintenance man, was told by Bennett and Kress that they wanted him to install a heavy-duty voltage meter in his shop at the rear of the club, using the name of his own company, Modernistic Industries. Early in March, 1965, Robert Bennett, Harry's son and also an unindicted co-conspirator, had a conversation with D'Angelo. D'Angelo told him about the proposed installation of the control device and showed him a business card with Kress's name on it. A day or two later, Harry Bennett showed a similar card to his son and told him that he was willing to pay $15,000 for such a device. James and Orrels traveled in James's car to Tulsa, Oklahoma. They rented a heavy-duty U-Haul trailer for a one-way trip to Gulfport. They then picked up from Kress's business premises a number of heavy steel plates and wire coils and transported these items from Tulsa to Gulfport. Robert Bennett informed his father that he and Hutchins were planning to go to New Orleans, and Harry Bennett asked his son to pick up a concrete saw for Maurice Arnold. The saw was obtained and Maurice Arnold attempted to use it during the morning of March 19th to cut holes in the floor of the Red Carpet Club underneath the dice table. Present at that time were the defendants James and Rolling. When it was realized that the concrete saw would not enable them to cut sufficiently

large holes to hold the steel plates, Arnold and James drove to Gulfport and rented an air hammer to finish the job. The plates and coils were removed from the trailer by James, Rolling, Arnold and two assistants, and when the holes under the table had been cut, the equipment was placed in them and wires connected from an electric power source. The electromagnets thus created constituted the operative part of a device commonly known as a "juice joint," the purpose of which was to control the roll of the dice.

The Red Carpet people encountered considerable difficulty in collecting on checks cashed by its customers. Those who came to gamble would cash sizeable checks for that purpose and some would stop payment on their return home or would have insufficient funds in their accounts. Hutchins suggested the creation of an independent organization to cash the checks. Hutchins and Robert Bennett set up a company with Hutchins as president and Jean Proctor, an unindicted co-conspirator, as secretary. Hutchins and Robert Bennett were to receive two and one-half percent of the value of the checks handled as their commissions. The Check Cashing Service account was opened in March, 1965, by Hutchins, and it remained active, to a greater or lesser extent, until November, 1965. The use of the mails to transmit the checks cashed by customers of the Red Carpet Club (and of Deano's Lounge) was charged as an element of the conspiracy in Count One of the indictment and as an element of the substantive offenses in Counts Three and Four. Considerable evidence was adduced concerning specific instances of the cashing of checks for customers from outside Mississippi. Typical of the testimony given by the customers was that of John Shipley, who testified that he cashed a number of checks on Louisiana and Alabama banks but that, having concluded that the dice he had been playing with were loaded, he stopped payment.

The Red Carpet Club was closed by a local injunction in June of 1965. Bennett, D'Angelo and Rolling decided to move the gambling operation to a new location. Accordingly, on August 3, 1965, D'Angelo leased an empty restaurant across the street from the Red Carpet. Harry Bennett put up the money to remodel it for use as a gambling casino. Bennett was to receive forty percent of the profits from the new operation (Deano's Lounge); D'Angelo was to receive twenty percent, and Rolling was to receive ten percent. Several months later Arnold, Rolling and others moved the "juice joint" from the Red Carpet Club to Deano's Lounge. Arnold and Rolling tested the device. It worked satisfactorily for some three or four days. The main switch caught fire. Arnold called Kress in Tulsa and told him about the fire. Two weeks later Kress brought a new switch. He visited Harry Bennett in the latter's office and tried to persuade Bennett to invest sufficient money in the "juice joint" to insure that it would work efficiently, but Bennett refused to spend any more. Friction developed between Bennett and D'Angelo. D'Angelo bought out Bennett's interest in Deano's and decided to set up a new system of check collection. On October 4, 1965, he sent defendant Whitmire to the bank to open an account under the name of A. D. Marks. Whitmire, who had worked at the Red Carpet Club and was employed in the same capacity at Deano's was paid an additional commission of ten percent of the value of the checks she handled. On November 22, 1965, the Sheriff of Harrison County, having been informed by the Federal Bureau of Investigation that a juice joint was operating in Deano's Lounge, called defendant D'Angelo to his office and told him that he wanted the device removed. The next morning at six o'clock a deputy sheriff went to Deano's and removed the magnetic plates. On that same day D'Angelo handed over to Special Agent Graben a quantity of dice, two pairs of which were magnetized and a number of misspotted pairs.

COMPOSITION OF THE JURY

There is no merit to the argument that grand and petit jurors were selected in an unconstitutional manner because the Jury Commission positively considered the race of Negroes in an effort to achieve a jury list which represented a fair cross-section of the community. The Clerk testified that the jury array which was summoned consisted of 52% women and 33⅓% Negroes. These percentages conform to the identical proportions that women and Negroes appeared at the last census. This Court, *sitting in banc*, has implicitly approved just such a system as was used here by the Clerk of the District Court for the Southern District of Mississippi. *Brooks v. Beto* (5th Cir. 1966), 366 F. 2d 1, cert. denied 386 U. S. 975 (1967).

THE SUFFICIENCY OF THE INDICTMENT

Appellants filed timely motions to quash the indictment on the grounds that it did not charge with reasonable certainty the nature of the Mississippi gambling offense which appellants are alleged to have violated. All that is required under Federal Rules of Criminal Procedure 7 (c) is that the indictment be a plain, concise and definite written statement of the essential facts constituting the offense charged. An indictment is deemed valid when it informs the accused of the offense with which he is charged with sufficient specificity to enable him to prepare his defense and to avoid the hazard of the accused being prosecuted for the same offense. *Rood v. United States* (8th Cir. 1965), 340 F. 2d 506, cert. denied 381 U. S. 906. We are convinced that this indictment, framed in the terms of the statute, measures up to that standard. *Gilstrap v. United States* (5th Cir. 1968), 389 F. 2d 6, cert. denied 391 U. S. 913 (1968); *Turf Center, Inc. v. United States* (9th Cir. 1963), 325 F. 2d 793. The indictment makes reference to

dice, to the interstate transportation of a juice joint, and to the cashing of gambling checks. Surely defendants knew or should have known what section of the Mississippi statute was allegedly violated. The district court's ruling which denied the motion to dismiss the indictment was correct.

THE DENIAL OF KRESS' MOTION TO SUPPRESS

Kress sought by pre-trial motion and at the trial to suppress various items seized at his home and manufacturing plant in Tulsa, Oklahoma on July 21, 1966. He was arrested at 7:30 A. M. on the same date. Identical affidavits had been prepared the same day. These furnished the basis for three warrants to search and seize property at the home, manufacturing plant and in the automobile of Kress. His counsel argues that the search was a general exploratory one in violation of the Fourth and Fifth Amendments, and that probable cause was not demonstrated in the affidavits. We do not agree. The search was for the instrumentalities involved. It was not general. It was not exploratory. The place to be searched and the items to be seized were as precisely identified in the warrant as the nature of the activity permitted. When circumstances make an exact description of instrumentalities, a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking. *Spinelli v. U. S.* (8th Cir. 1967), 382 F. 2d 871, reversed on other grounds, 37 L. W. 4111 (1969). The fact that the warrant described the articles to be seized as "gambling paraphernalia, including but not limited to dice, crap tables, wires, magnets, coils, solenoid switches, records, sales receipts, customers' lists, shipping orders, supplies, machine equipment, machine tools and hand tools for the manufacture of gambling paraphernalia, in-

cluding but not limited to dice, crap tables and cards," etc., did not make the description vague and insufficient.

Probable cause was amply demonstrated in the affidavits. The Commissioner, before issuing the search warrants, was given more than sufficient facts from a highly credible source to justify the belief that probable cause existed. The affidavit by an F. B. I. agent identified the informant as a special attorney from the Department of Justice. The Source of the informant's hearsay information was sworn testimony by witnesses before a federal grand jury being conducted by the informant one day before the affidavit was sworn. In addition, the background information contained in the affidavit, based on the affiant's first hand knowledge and current information, corroborates and supports the informant's conclusions. The district court properly denied defendant's motion to suppress.

THE MULTIPLE CONSPIRACY ISSUE

The indictment alleges a single conspiracy in a single count. Various overt acts were specified. Appellants argue that the evidence reveals not one conspiracy, but four, and that for this reason a judgment of acquittal on Count One should have been directed. Reliance is placed on *Kotteakos v. United States* (1946), 328 U. S. 750. There, the Supreme Court found that substantial prejudice resulted to a single defendant when he and thirty others and eight separate conspiracies were intertwined under a single general indictment, thus making it impossible to adequately prepare a defense, and confusing the jurors to such an extent that they subconsciously transferred guilt from person to person. Nothing comparable exists here. The Supreme Court has severely limited the applicability of Kotteakos in the case of *Blumenthal v. United States* (1947), 332 U. S. 539. In *Blumenthal*, the indictment charging a conspiracy among two men, who

acted as the distributors for liquor owned by a third unknown man, and three others who sold that liquor to a number of tavern owners. The distributors provided cases of the liquor to the salesmen who in turn sold it to the tavern owners at a price on its face below the legal maximum, but the tavern owners surreptitiously paid the salesmen an additional illegal amount, part of which was kept by the distributors and part of which was transmitted by them to the hidden owner. The salesmen did not know of the existence of the actual owner of the liquor they were selling, and each of the three operated individually in their dealings. The Supreme Court found that, although in a hyper-technical sense the evidence might be regarded as showing two agreements, the unique facts revealed a single overall conspiracy of which both agreements were essential and integral steps. In so ruling the court used this pertinent language:

> "Indeed that may be what took place chronologically, for conspiracies involving such elaborate arrangements generally are not born full-grown. Rather they mature by successive stages which are necessary to bring in the essential parties. And not all of those joining in the earlier ones make known their participation to others later coming in.
>
> * * *
>
> "We think that in the special circumstances of this case the two agreements were merely steps in the formation of the larger and ultimately more general conspiracy. In that view it would be a perversion of justice to regard the salesmen's ignorance of the unknown owner's participation as furnishing adequate ground for reversal of their convictions * * * By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits and

by their common single goal." *Blumenthal,* 322 U. S. at 556-558.

Here, as in *Blumenthal,* it is the common goal which provides the continuing theme of the conspiracy. The evidence supports a finding that those present at the beginning as well as those remaining at the end, and those who participated in between, intended to establish a gambling enterprise and to promote that enterprise in a variety of ways through the use of facilities in interstate commerce.

THE MOTION TO DISMISS FOR MISJOINDER OF PARTIES; THE MOTION FOR SEVERANCE

Appellants insist that the district judge erred in failing to grant their motions for severance, both as to the joinder of offenses and to joinder of defendants. Under Rule 8(a) of the Federal Rules of Criminal Procedure, joinder of offenses is ordinarily appropriate where, as here, the offenses arose out of a series of connected acts, and the evidence as to each count, of necessity, overlaps. The contention here in support of an 8(a) severance hinges entirely on the assertion that the proof showed separate conspiracies. The record demonstrates the fallacy of that proposition. Vol. 8, *Moore, Federal Practice,* § 8.05[2], pp. 8-19, 2nd Ed. of 1968; *Johnson v. United States* (8th Cir. 1966), 356 F. 2d 680, 682. Similarly, there was no misjoinder of defendants. Rule 8(b) of the Federal Rules of Criminal Procedure expressly permits joinder if defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. A conspiracy count may be joined with the substantive offenses which are its objects. *Chadwick v. United States* (5th Cir. 1941), 117 F. 2d 902, cert. denied 313 U. S. 585, Rule 8(b) specifically states that "all of the defendants need not be charged in each count."

Having found that there was no misjoinder of offenses or defendants under Rule 8, there remains the question of whether defendants were prejudiced so as to require a severance under Rule 14. *Tillman v. United States* (5th Cir. 1969), 406 F. 2d 930. The existence of prejudice, in large part, depends upon the facts of the individual case, *Flores v. United States* (5th Cir. 1967), 379 F. 2d 905, and the granting or rejecting of a motion to sever rests very much in the discretion of the trial judge. *Smith v. United States* (5th Cir. 1967), 385 F. 2d 34, 37. The defendants must prove something more than the fact that "a separate trial might offer a better chance of acquittal." *Tillman v. United States* (5th Cir. 1969), 406 F. 2d 930, 935. The issues in this case were not complex and were clearly presented to the jury. Any prejudice resulting from the joint trial is at best speculative. Accordingly, we hold that a severance under Rule 14 was not required.

DOES BRUTON REQUIRE REVERSAL?

In *Bruton v. United States*, 391 U. S. 123, a confession of a co-defendant who did not take the stand was used against Bruton. The Supreme Court concluded that this constituted a deprivation of his rights under the confrontation clause of the Sixth Amendment. The Government concedes that certain admissions of co-conspirators were admitted into evidence under instructions limiting their application to the declarants. The Government does not concede that the admission of those statements constituted reversible error.

The only statement of a co-conspirator which mentioned appellant Kress directly was that of appellant D'Angelo made to Paul Brown. D'Angelo told him that he sent for Kress to fix the controls on the "juice joint" and paid him for the trip. The evidence linking Kress to the conspiracy and to the substantive offense charged in Count

Two was produced by a horde of independent witnesses. Kress installed the wiring for the device and tested it; Kress repaired the device and shipped new parts; he shipped magnetized dice for use with the "juice joint," all of which firmly established him as a member of the conspiracy from its inception; if no proof of his implication with the later stages of the conspiracy had been introduced he would still have been properly convicted.

No statement by co-conspirators referring to Hutchins or Rolling either directly or indirectly were testified to by third parties.

The only statement of a co-conspirator which made reference to D'Angelo was that of Whitmire. No claim under *Bruton* is available, however, because Whitmire took the stand and was thus subject to cross-examination. *Santoro v. United States* (9th Circ. 1968), 402 F. 2d 920; *Rios-Ramirez v. United States* (9th Cir. 1968), 403 F. 2d 1016. The only statement of a co-conspirator implicating James was made by Orrels to Special Agent Dukes. He admitted that he went to Tulsa and returned to Mississippi with an unidentified companion. The details of his statement would have permitted the jury to infer that the second man was James. James' own statement to Special Agent Toole repeated the details of the trip, and independent testimony established his role in delivering and unloading the "juice joint." The statement of James, testified to by Special Agent Toole, although making no direct reference to the fact that another person accompanied him, was sufficiently linked to other testimony to enable the jury to infer that the trip was the same one in which appellant Orrels participated. Orrels' own statement describing exactly the same events was testified to by Special Agent Dukes. It was corroborated by other independent testimony. Paul Brown testified that D'Angelo had told him that appellant Whitmire was handling the checks at Deano's Lounge. Appellant Whitmire took the

stand and admitted her connection with the Marks account, and in light of the independent testimony of the bank president and corroborative documentary evidence, no substantial right of this appellant was prejudiced by that single reference.

Our judgment must be, and is, based on our own reading of this record and on what seems to us to be the overwhelming independent evidence in support of the jury's verdict. Applicable here is the language of the Supreme Court in speaking of the evidence in *Harrington v. California*, 37 L. W. 4472 (June 2, 1969);

> "It is so overwhelming that unless we say no violation of *Bruton* can constitute harmless error, we must leave the state conviction undisturbed."

THE JUDGE'S CHARGE

Appellants press upon the contention that the instructions of the trial court were so erroneous and confusing as to constitute grounds for reversal. We have carefully reviewed the instructions and cannot agree. The judge's charge that "proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs" consistently has been upheld as not being reversible error. *Holland v. United States* (1954), 348 U. S. 121; *United States v. Nuccio* (2nd Cir.), 373 F. 2d 168, cert. denied 387 U. S. 906 (1967); *United States v. Restaino* (3rd Cir. 1966), 369 F. 2d 544; *United States v. Wright* (7th Cir. 1967), 365 F. 2d 135, cert. denied 386 U. S. 918 (1967). It is true that the Supreme Court in *Holland* stated under similar circumstances that it would have been best if this section of the charge had been in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act. In reviewing the charge on reasonable doubt we look to the whole instruction rather than isolat-

ing our attention to one sentence. *Baker v. United States* (5th Cir. 1969), No. 24094, June 20, 1969. When this is done it is seen that the district court properly and completely defined reasonable doubt. None of the other contentions as to the charge warrants more than the statement that each has been considered and found to be without merit.

THE GRAND JURY TESTIMONY

Appellant's next argument is that the trial judge erred in refusing to make available for inspection the grand jury testimony of Robert Bennett and Maurice Arnold. Both were named as co-conspirators. Defense counsel sought this testimony by pretrial motion and timely requested the production of the grand jury statements at the close of the testimony of each witness. In each instance the district judge denied access after an in camera inspection and a finding that there was no material inconsistencies. Defense counsel insist that the court's action is contrary to *Dennis v. United States* (1966), 384 U. S. 855, as interpreted by *United States v. Youngblood* (2nd Cir. 1967), 379 F. 2d 365, and *Allen v. United States* (D. C. Cir. 1968), 390 F. 2d 476. It is true that the appellate court citations urged upon us seem to have formulated a rule to the effect that a showing of "particularized need" as required by *Dennis* is no longer a prerequisite to disclosure of a witness's grand jury testimony after he has testified at trial, but this court has made it clear that the test of particularized need must be met before the secrecy of the grand jury may be breached. *Nolan v. United States* (5th Cir., 1968), 395 F. 2d 383; *Stassie v. United States* (5th Cir. 1968), 401 F. 2d 259; *White and Metz v. United States* (5th Cir., June 18, 1969).[1] Appellants' request was

[1] Literally Rule 16 (b) allows discovery on a specified showing, but on the principle that the specific controls over the general, it would seem that a motion to inspect grand jury testimony should be under Rule 6 (3) rather than 16 (b) (See Fed. Practice and Procedure, Wright 1969 Ed., pg. 180).

made without showing that the testimony was material to their defense, and therefore is distinguishable from *United States v. Hughes* (5th Cir., June 2, 1969). Besides, as to each of these witnesses, defense counsel had available Jencks Act material and made the fullest use of it with extensive cross-examination. The trial judge here complied to the fullest extent with the practice specially approved by this Court in *Mendez v. United States* (5th Cir., 1968), 393 F. 2d 312.

THE DICE TABLE

A table seized at the plant of Jack Kress contained an electric coil embedded between the boards of the table surface. This was not the identical type of electric coil embedded in the floor of the Red Carpet Club. It was never marked as an exhibit but was used as a visual aid for illustration during the testimony of two government witnesses. Appellants rely on *United States v. Adams* (2nd Cir. 1967), 385 F. 2d 548, to support their argument that it was error to permit the jury to see this table with a juice joint which was not introduced in evidence. *Adams* held it error to send to the jury room an envelope containing incriminating writings made by narcotic agents while making purchase of cocaine which had not been received in evidence. Three obvious facts distinguish *Adams*: (1) The exhibit was in writing and was hearsay which would have been inadmissible if offered in evidence, unlike the instant case wherein the dice table was merely demonstrative evidence to illustrate the testimony; (2) The envelope's contents were never mentioned during the trial but were seen by the jury for the first time during their deliberations; (3) appropriate objections were made at the time. In the instant case no objections, except as to relevancy, were made at the time the table was brought into the courtroom or during the relevant testimony. The testimony, by itself, was admissible, and permitting the jury to see a dice table during testimony describing it surely would not constitute reversible error.

PROSECUTOR NEFF BEFORE THE GRAND JURY

The assertion that the prosecution improperly influenced the Grand Jury is premised on the fact that Prosecutor Neff, in the presence of a grand jury, advised appellant Rolling, who had been subpoenaed as a witness, that his conduct was the equivalent of robbery, except that he used an electromagnet rather than a gun. Granting that the remark exceeded standards of propriety, the prejudice claimed by appellants just cannot be substantiated when it is realized that the indictment returned by the grand jury before whom the remark was made was not the indictment on which appellants were tried. A different grand jury returned the indictment at issue here. It knew of the prior true bill, but knew nothing of the description of Rolling as a "robber."

Appellants also argue that the "due administration of justice" was impeded by a one-paragraph press release by Mr. J. Edgar Hoover, which essentially repeated only what was contained in the indictment. This press release was issued 18 months before trial. Continuing their general theme that the government sought to convict by means "fair or foul," appellants assert that the prosecutor deliberately went beyond strict rebuttal and made an argument that covered the whole case. Appellants point to no specific elements of the government's rebuttal which they claim were prejudicial. The trial judge found the argument to be fair and responsive. In reviewing the transcript, we do not find the argument of the prosecutor to be of such a nature as to warrant reversal.

Other points urged by appellants have been considered but do not warrant discussion.

Affirmed.

APPENDIX B.

United States Court of Appeals
For the Fifth Circuit.

October Term, 1968.

No. 26162.

D. C. Docket No. 8718—Criminal.

Donald Lester James, Ivan Orrels, Dewey D'Angelo, Alice Dianne Whitmire, Raymond Leroy Rolling, Jack Edward Kress, and Harvey Hutton Hutchins,
Appellants,

v.

United States of America,
Appellee.

Appeals from the United States District Court for the Southern District of Mississippi.

Before Brown, Chief Judge, Dyer, Circuit Judge, and Hunter, District Judge.

Judgment.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate: September 17, 1969.